The Virginia Indigent Defense Commission
Executive Committee Meeting
1604 Santa Rosa Road, Suite 109
Richmond VA 23229
January 24, 2012

The Executive Committee of the Virginia Indigent Defense Commission was called to order at 1:05 pm by Chairman, Judge Alan Rosenblatt (ret.). Other Commission members in attendance were Maria Jankowski and Kent Smith. Administrative staff included Executive Director, David Johnson; Deputy Director, DJ Geiger; Standards of Practice Attorney, Jae K Davenport; and Administrative Assistant, Diane Pearson.

Quorum requirements have been met.

The first item on the agenda is the approval of minutes.

Mr. Smith moved to approve the June 9, 2011 minutes as amended to add "proposed" slate of officers. Ms. Jankowski seconded the motion. The motion carried.

The next item on the agenda is the review of legislative bills.

There was discussion about bills sponsored by members of our Commission.

House Bill 77 – Jury Sentencing

Ms. Geiger said that House Bill 77 gets introduced every year. Delegate Morgan Griffith was the prior patron; Delegate Habeeb who has his seat is the current patron. The bill states that if a jury cannot agree on punishment the courts can ask a different jury to ascertain different punishment, unless the defendant and the Commonwealth agree that the court can do it. Traditionally we have not been in favor of this bill.

There was discussion about the bills that we were asked for input by the Department of Criminal Justice (DCJS). There were five bills they asked for our input on but HB77 was not one of them. This was one of the bills that was on the radar that it is going to negatively affect the way we practice for our clients.

Ms. Geiger said that she believes HB77 may not pass the Senate and that we have the ability to have pretty strong input on it in the chairman's workgroup. The chairman's workgroup includes representatives from the Governor's office, the Commonwealth Attorneys, the Attorney General, the Crime Commission, the VIDC and staff of legislative services. The workgroup has been used for several years now by the chairs of the Senate Courts Committee to identify the pros and cons on legislation. It allows us to bring forth all the arguments, concerns, and constitutional issues. That has served very well.

There was discussion about jury sentencing. One of the concerns is that the legislation provides that if a jury who has listened to all the witnesses, all the evidence, and made the determination of guilt or innocence is unable to agree on a sentence, they can substitute a whole new group of people by having the prosecutor and the defense attorney summarize all of the evidence that was given and then the new jury would decide the sentence.

Mr. Johnson said the case would need to be re-tried and therefore the whole thing is silly. It would be based on a summary. Procedurally they are saying it's a cost savings measure and that it does not subject a witness to testify again when the jury can't agree on a sentence.

Ms. Geiger believes the bill may not pass but wants to express concerns the Commission would have with it. The Commission will see how the bill does.

HB101 - Rules of Evidence

This bill is probably not of substantive concern but it is out there and we will be governed by the rules of evidence if adopted. This is an attempt to codify the current rules of evidence that are used for trials. The courts have adopted these and have asked they not be amended in any way that they just be voted up or down. There was one comment from John Douglass and he hopes everyone would support this because he thinks it is needed in Virginia. This does not change any law; it just puts it all in one place.

There is no need for us to take a position but there is some interest and it will affect our attorneys, they will have to learn the rules.

HB123 – Specialty Criminal Court Dockets
This bill is dead.

HB173 and SB184 – Interpreter Appointment

This bill was approved in the House Criminal Law Subcommittee for reporting yesterday so it will go to the full committee.

If an interpreter is appointed and a person is found guilty that person must pay the cost of the interpreter. The patron has compared it to the statute that requires a person, if found guilty, to pay for a court appointed attorney. The concerns staff has with it is that there is a difference between a court appointed attorney, because you can waive your right to counsel, your ability to understand what is being said about you and to you, is not something that can be waived. There are no caps in this bill on how much can be charged for an interpreter and there is no delineation between whether that interpreter is solely for in court time or if it is a combination of in court and when you are meeting with your attorney.

There was discussion regarding the appointment of an interpreter. It is usually the courts decision to appoint an interpreter to a defendant. The problem is that the defendant is then

charged for the interpreter. The Supreme Court said there is delineation between court appointed counsel and interpreters based on the fact that one can be waived and the other cannot and this would be a loss to Virginia of federal funds of about $2 million. The response was that there would be a hole in the budget. The bill was reported.

Immigrant groups opposed this bill. It did come out of House Courts. This issue is something that we need to say something on in the Senate. The Senate version of this bill is up in Senate Courts tomorrow. Ms. Geiger expressed the same concerns in the Chairman's workgroup and it might be a good idea to express the concerns to the full committee.

Ms. Geiger thinks the Supreme Court will get a better reception in the Senate.

Mr. Johnson added that this might be a factor for us but trying to understand the other side; they might view this as a way to bolster the criminal fund. If the interpreters keep eating up more of the criminal fund then there is only so much left for everything else like experts and court appointed counsel. He thinks this is looking at a way to keep from coming up short in the criminal fund. Second to guardians, interpreters are the costs that have been skyrocketing the most.

There was discussion about costs of interpreters.

We do not necessarily need to take a position on this but we need to express concern. Expressing concern is different than taking a position in that we are not saying we are opposing or supporting this but we have concerns about parts of it.

We can share the same concerns as the Supreme Court.

HB718 and SB419 – Juveniles Tried as Adults

We did support the Judges' determination in prior sessions when asked for a position. This would be expanding the number of charges or types of charges that the Commonwealth Attorney can certify for trying juveniles as adults and expand it into the drug offenses, mostly gang offenses as well and these would be repeat violations. Ms. Geiger thinks this is the ongoing battle for certification power between Judges and Commonwealth attorneys.

We were asked last year for a position on the juvenile transfer issue and we came to the decision that it should be in the Judge's discretion. Given the opportunity or asked, we should maintain the same position.

HB750 – Inherent Authority; Deferred Disposition in a Criminal Case. HB51 was rolled into this bill. In order for a Judge to defer disposition on anything it would either have to be by statute or all of the parties would have to agree. It gives the Commonwealth Attorney veto power on any deferred disposition case.

Mr. Johnson added that they killed this anyway by letting Judges know that when they come up for reappointment they now need to bring in a list of every case they deferred judgment on and the reason they deferred judgment.

This would be a great option for our clients but it might not make much difference.

There was discussion regarding the impetus for the deferred disposition legislation. A House member indicated there was an incident in which a Judge ignored a mandatory minimum sentence and deferred the case. The House member found that to be unacceptable.

We oppose this bill.

HB849 – Juveniles; Conduct review hearing in secure facility via two-way electronic video

The bill allows for video appearances in juvenile cases where the juvenile is in a secure detention facility. The statute already allows juvenile hearings when the juvenile is not in a detention facility so this is one last group that was not encompassed. It could be helpful; there might be a value to have our folks with the juvenile at the detention facility when it is going on because they are younger and they are detained but we could handle that via a policy.

No one has opposed this and it is probably viewed as efficiency in the court system. Also we are already doing it in some juvenile hearings so there really is no issue.

It may be an issue down the line. It could be a policy for the public defender offices to establish. It is probably going to pass and we do not need a position on it but it may affect the way we are handling cases or it may add a complication to it.

HB956 – Immediate Sanction Probation; Removes two program limits

This bill along with HB1126 and SB111 are all somewhat similar. HB1126 and SB111 are the Governor's bills.

Mr. Johnson said that this came out of the Governor's Prisoner Reentry Council and is modeled after the Hope program from Hawaii. The idea is that when someone has a technical probation violation (currently depending on the jurisdiction, the sentence could be nothing or it could mean penitentiary time), there is an evaluation process. If there is an indication there are substance abuse issues person would be referred to a drug court track; if there is one. Otherwise they would go into this SURE program. The idea is that you know if you get another technical violation you will be serving 5-10 days, 15-20 days, 25-30 days, and 90 days to 12 months.

If the attorney will be there at each of these violations, it can then be waived. It is not the potential penalty; it is knowing that you are going to get the penalty.

The intent is that these programs are mutually exclusive of each other because SURE does not want someone with a dependency; they would be funneled to a drug court.

Drug court judges had a lot of concerns that this might cut into their drug court numbers. It shouldn't if it works right because if it is a substance abuse issue it shouldn't go into their track.

This is supposed to address the idea that our penitentiaries are full of technical violators and that is silly.

Ms. Geiger said that HB956 is basically taking what was a pilot program for an immediate sanction probation program and making it permanent. There were two pilots. In HB956 the patron, Delegate Bell, is asking for it to become a regular program. This bill is somewhat similar because if you get arrested, you have the hearing immediately, but the sanction part is different and the known quantity is different. His bill basically says that the court can revoke no more than thirty days and then continue to modify other existing terms and conditions. The immediacy of the hearing is still there. The two bills might not be able to coexist without making one seem less valid than the other.

Ms. Geiger's understanding is that Delegate Bell has amendments to the SURE legislation and they have not done his bill yet in the House. He is carrying it, but he is not the biggest fan of it at this point. She is not sure if he is going to move it toward something more in line with his HB956, which is the existing pilot program or if they will convince him that HB1126 is more palatable.

HB1126 is what the Governor is looking for as the reentry group's preference but there is this other existing language that does not gel well.

We do not have to take a position on this.

There was discussion about probation violations. If there is suspicion that there is a drug dependency they can offer drug court, you can say no and if they offer SURE you can say no to that. They will then proceed under regular procedures.

They have to at least have veto power, whether they exercise it or not.

HB992 and SB224 – Assault and Battery; Class 1 Misdemeanor Against a Family or Household Member

We do not need to take a position on this.

There was a case that went Federal and the underlying offense needed to have a prior conviction of assault and battery but with some physical force shown. The documentation presented without a transcript made no indication of physical force because the statute in

Virginia for battery does not require physical force. There was not enough there to prove the prior conviction to get whatever conviction they were looking for.

Mr. Johnson said that assault does not require physical force, it is any touching. This bill wants to separate out battery. The problem is that there are thirty states that go by common law. The Federal statute would need to be changed rather than have thirty states change.

HB1086 – Restitution; collection

This allows the victim in a case to authorize the Commonwealth Attorney to collect restitution on their behalf, if the court has ordered it. Restitution and collection fees cannot exceed the amount that is owed to the victim so any fees would be incorporated into that.

Mr. Johnson said that this does not impact our clients because they owe the restitution.

There was discussion about restitution.

There was no further business.

Mr. Smith moved to adjourn. Ms. Jankowski seconded the motion. The motion carried.

The meeting adjourned at 1:55pm

Respectfully Submitted: Approved By:

_____ _____

Diane Z. Pearson, Administrative Assistant David J. Johnson, Executive Director